BrEXIT AND BreUK-UP

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Aidan O'Neill Di 26 Jul 2016

Looking back on the result of the Brexit vote, future historians may well conclude that the post-WW II United Kingdom of Great Britain and Northern Ireland was, like Belgium, held together by the European Union.

Flanders and Wallonia dare not split into independent countries (despite decades of mutual antipathy and non-co-operation) because neither wishes to lose Brussels as its capital. But London does not hold the UK together. The Brexit vote revealed the vast gulf in social attitudes and political aspirations between London and the rest of England. The encircling M25 haloes and isolates London, just as the medieval palisade separated pre-Tudor Dublin from “Irish” Ireland. *L’Angleterre profonde* now lies beyond the Pale, and London as an international city state in waiting is profoundly out of sympathy and out of step with it.

How to be Unionist

Meanwhile, north of Hadrian’s Wall, a different politics flourishes in which London, and the rest of England, appear increasingly irrelevant. The SNP now run a minority administration from Edinburgh, largely as a result of the remarkable resurrection of the Tory vote under the leadership of Ruth Davidson MSP and the continued collapse of the Labour vote under the leadership of Kezia Dugdale MSP. But the Scottish Tories keep their distance from their sister party to the south and contemplate, as part of their on-going de-toxification, dropping the label “Conservative” and returning to their pre-1965 designation as the Scottish Unionists. And Scottish Labour sinks into yet deeper irrelevance, while flirting with talk of a post-Brexit complete federalisation of the UK.

In his speech on 14 September 2014 following the result of the Scottish independence referendum (in which one of the claims made by those advocating the *status quo* was that only by voting to stay in the UK could Scotland ensure that it remained within the EU) the then UK Prime Minister David Cameron proclaimed that he was “a passionate believer in our United Kingdom” and that he “wanted more than anything that our Union stay together”. And in her 13 July 2016 acceptance speech on succeeding him as UK Prime Minister Theresa May noted that

> *“The full title of my party is the Conservative and Unionist Party. And that word unionist is very important to me. It means we believe in the union, the precious, precious bond between England, Scotland, Wales and Northern Ireland.”*

But just what makes this bond so doubly “precious” and why it should be the object of “passionate belief” has not been further developed. It is not clear that this is, in any event, a sentiment that is shared in *l’Angleterre profonde* by whose votes the Conservative party won its unexpected majority in the House of Commons in May 2015. The Conservative successful general election campaign was marked by dog-whistle anti-Caledonian insinuations that a vote for the Labour Party meant a vote for the SNP in coalition with it, putting “sad Ed” Miliband into the pockets of “smart Alec” Salmond and “tricky Nicky” Sturgeon.

As the distinct polities which make up the still nominally United Kingdom grow ever further apart, the only solution which appears to be offered is the delegation – but never the complete transfer – of more powers to the English regions and to the non-English nations. This might be termed disintegrative devolution.

But the shibboleth of sovereignty means that power is never unequivocally divested from Westminster. Powers devolved are powers retained. Thus when it comes to the (Brexit) crunch from a Westminster perspective, while the devolved legislatures and executives may properly expect to be consulted on and advised of negotiations, they cannot expect to participate in them. And they are certainly not regarded as having any

power to prevent either the UK as a whole, or any of its constituent parts, from leaving the EU, notwithstanding that in the Brexit referendum (in which UK resident Commonwealth and Irish citizens, but not other EU citizens, had a vote) Scotland voted 62% in favour of remaining in the EU against 38% for leaving it, while the vote in Northern Ireland was 56% for remain and 42% for leave.

Honest Broker

Unlike Westminster, the devolved legislatures are elected on the basis of a franchise which gives the vote to citizens of other EU member states lawfully resident in their territories. The devolved executives may therefore properly claim to have obtained a democratic mandate from, and be democratically accountable, to these EU citizens; and may plausibly claim to have the constitutional duty to represent and give voice to those individuals' concerns and claims. But the fact that EU citizens currently lawfully resident in the UK are mentioned both by the Prime Minister and by her newly appointed Secretary of State for Exiting the European Union, David Davis MP, only in the context of their possible use as human shields or bargaining counters in the Brexit negotiations rather indicates that the little Englander politics of the "nasty party" have not been wholly abandoned under this new UK premiership.

Article 50(2) of the Treaty on European Union (TEU) states that in the negotiations and conclusion of an agreement setting out the arrangements for a Member State's withdrawal from the EU, account has to be taken of the framework for that State's "future relationship with the Union". The fact that the majority of the Scottish electorate voted to remain in the EU, that the Scottish Parliament is electorally answerable to EU citizens resident in Scotland, that the party forming the current Scottish administration completely dominates in terms of the electoral representation of Scotland in Westminster, all combine to put the current Scottish Government in a strong position to present itself to the other EU Member States (and to the Commission) as the only honest broker, seeking in good faith to facilitate a settlement between the UK Government and the rest of the EU which recognises and preserves the rights of EU citizens settled here, and the rights of Britons who have exercised their free movement rights to live elsewhere in the EU.

As I have written in earlier posts, the least-worst way of achieving that end is for the UK to leave the EU, to re-join EFTA and, in that capacity, to sign up to the European Economic Area (EEA) Agreement. Although it was originally envisaged to be a transitional arrangement for European States preparing their populations for full EU membership, the half-way house of becoming an EFTA-EEA state has proved to be surprisingly resilient. While EFTA-EEA states are bound by the original four freedoms of the Treaty of Rome – goods, services, workers (*not* citizens) and capital – and by its competition law and State aid rules, they are not subject to oversight by the Commission, the Council or the European Parliament, nor are they under the jurisdiction of the Court of Justice of the European Union, nor are they bound to give effect to afford EU law direct effect in, and primacy, over domestic law. Becoming an EFTA-EEA state would mean that the UK exited the EU's Common Agriculture and Fisheries Policies, Justice and Home Affairs, Common Foreign and Security Policy, Taxation harmonisation, Monetary Union, Customs Union, and Common Trade Policy. Coming out of the EU common trade policy would means that the UK could seek to negotiate and conclude free trade agreements directly with other non-EU states, without the involvement of the European Commission.

The EFTA-EEA Scenario

For the UK to re-join EFTA would need the agreement of all its current members: Switzerland, Norway, Iceland and Liechtenstein. To sign up to the EEA Agreement and become an EFTA-EEA state would however require the agreement of the three other EFTA-EEA – Norway, Iceland and Liechtenstein – as well as the EU and all its Member States (the EEA agreement being in EU law terms a "mixed agreement" for which competence is shared between the EU and its constituent Member States). Norway, in particular, may well be concerned that the UK's becoming a fourth EFTA-EEA state would de-stabilise the whole arrangement and eclipse Norwegian influence. One way of calming Norwegian fears about "perfidious Albion" might well be to make provision to allow for the UK's status as an EFTA-EEA State to be in the first instance on a provisional basis, with say a break point in 5 years at which point all parties can re-assess matters and determine whether to continue with it. It may be that after 5 years of negotiating free trade deals with non-EU states, the UK would be happy to go it

alone outside the EEA. It might find that, politically and economically, it suits the UK – and all the other contracting parties to the EEA agreement – for it to remain as an EFTA-EEA state. It might be that after 5 years in the EEA the UK asks, as envisaged by Article 50(5) TEU, to re-join a doubtless reformed and chastened EU. The point about this break point is that it allows all parties a secure transitional phase under existing rules and supervisory structures and gives time to take stock while maintaining economic stability for both the UK and Europe as a whole.

The prize for a nationalist Scottish administration brokering what might be termed a five year EFTA-EEA "naughty step" membership for the UK is that in this period, Scotland can take the time to cultivate its own international relations, particularly with Norway, Iceland and Ireland as well as with the rest of the EU member states and the EU institutions. This might be done with a view to negotiating and agreeing among all relevant parties for Scotland to become itself an independent EFTA-EEA state at the end of the five year transitional period for the UK in the EEA. The advantage to its becoming an independent EFTA-EEA membership is that Scotland would not be committed to joining the Euro under such an arrangement. Spain too could be reassured – and unlikely to exercise its veto – on Scotland becoming an EFTA-EEA state, since this would not set any kind of precedent for the secession of Catalonia with a view to it becoming a new member State of the EU in addition to Spain. But once established as an EFTA-EEA member State Scotland would, if so minded, then be in a position to open negotiations to re-join the EU since it would then fulfil the requirements of Article 49 TEU as a "European State which respects the values referred to in Article 2 TEU and is committed to promoting them".

As a matter of public international law, these negotiations can be conducted and binding agreements concluded while Scotland remains part of the UK, because public international law recognises that bodies other than independent States can enter into binding international Treaties, provided that this is within their competence as a matter of national law. For example Article 32(3) of the German Basic Law, the *Grundgesetz* states that "insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government". One example of such an international Treaty is the 1960 Steckborn Convention concluded between the *Land* of Baden-Württemberg, the Free State of Bavaria, the Republic of Austria and the Swiss Confederation on the protection of Lake Constance against pollution. EU law itself already makes express provision in Regulation 1082/2006 for the creation by regional and local authorities within the Member States of "European Groupings of Territorial Co-operation (EGTC) which are transnational bodies with legal personality created to facilitate territorial co-operation with other bodies in other Member States and/or with neighbouring overseas countries or territories associated with the EU (OCTs) and/or with neighbouring third countries outside the EU ("neighbouring" being defined in Article 3a(1) as including sharing a common land border or facing a common sea basin).

The return of national responsibility for the conservation of fishing resources within the North Sea consequent upon the UK leaving the EU but joining EFTA (with a view to it becoming an EFTA-EEA state) might well provide an opportunity for Scotland immediately to enter into international agreements directly with Norway and/or Iceland on these issues, as well as on issues of environmental and energy policy associated with oil and gas extraction in the North Sea. As a matter of domestic law this might require some amendment of the Scotland Act 1998 since while Paragraph 7(2) of Schedule 5 to the Scotland Act 1998 devolves "observing and implementing international obligations" to Scotland paragraph 7(1) reserves to Westminster "international relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation". There would also have to be clear re-definition of the sea-waters recognised by the UK to be under (devolved) Scottish control.

Border Issues

Separately, Scotland as (part of) an EFTA-EEA state might seek to conclude or be party to agreements or memorandums of understanding directly with Ireland in relation to the status of Northern Ireland in the event of Scottish independence from the rest of the UK. In such a scenario the problem for the unionist population of Northern Ireland would be that there would no longer be a Britain to which they could cleave; they could no longer claim to be British but instead would simply be a faithful remnant of remaining citizens of a formerly United

Crown and Kingdom. It may be that a vote for Scottish independence could be agreed to trigger a referendum in Northern Ireland which might have three questions as follows: (1) in the event of Scottish independence do you wish Northern Ireland to remain in union with England and Wales ? If, and only if, less than 50% vote for this option, then the following subsidiary question might arise: if Northern Ireland is not to remain in union with England and Wales do you wish it to (2) go into union with Ireland ? or (3) go into union with Scotland ? Scotland might thereby be seen to be shouldering responsibility for the historic legacy of its king James VI and I's successful scheme to drive a dividing wedge between the Romanist Scottish and Irish *Gaeltachts* by the Plantation of Ulster with English speaking Protestant lowland Scots loyal to his Crown. As ever with our constitution, we need to go back to find the future.

The problem in all this is the attitude that the UK Government might take. At the moment Theresa May says she is committed to the maintenance of a "soft border" between Northern Ireland and the Republic of Ireland even once the UK ceases to be an EU member state. This could only be done, however if the UK entered into a customs union with the EU and agreed to maintaining the free movement of goods. But a common travel area across the island of Ireland could no longer extend throughout the territory of the UK if a post-Brexit UK repudiates EU free movement law. In effect, the price of maintaining a soft border for the six counties of Northern Ireland would be to translate that into a less permeable border, now situated within the Irish Sea, by the re-introduction of security entry controls (such as were maintained during the Troubles). In the event of Scottish independence this semi-permeable border would be transferred to the line between Carlisle and Berwick upon Tweed.

All these matters might of course be the subject of specific legal agreement among the now independent nations of the Anglo-Celtic Archipelago (ACA, formerly the British Isles) to be policed by a new international tribunal for the formerly United Crown and Kingdom (modelled perhaps on the current UKSC/JCPC but with the introduction of judges from Ireland as well as from Scotland, England Wales and Northern Ireland). This new court – which might be termed the Anglo Celtic Tribunal (ACT) – could assist in ensuring not only that the terms of any Anglo Celtic Agreement were duly adhered to but also, perhaps, have a role in ensuring a common standard of protection of fundamental rights across the nations of the home islands.

SUGGESTED CITATION O'Neill, Aidan: *BrEXIT AND BreUK-UP, VerfBlog,* 2016/7/26, http://verfassungsblog.de/brexit-and-breuk-up/.